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The Development of the Medieval Idea of Sovereignty

I

THE unsuccessful attempt of the Emperor Henry VII to bring King Robert of Naples to his knees marks the last imperial effort to assert in practice the universal overlordship of the emperor over kings and princes. This episode also reveals the influence of the papal curia on the outcome of this far-reaching contest. The quarrel between Henry VII and Robert of Naples constituted a real test case of the political strength of the medieval empire. The core of the question was whether the emperor was in reality the 'dominus mundi' as the law books so clamorously maintained: that is to say, had he jurisdictional powers and authority over the kings of the various kingdoms constituting the Holy Roman Empire, or were the heads of the kingdoms equal in their legal and political status to that of the emperor? The first alternative was naturally the point of view of Henry VII, the second, which signified the theoretical disintegration of the empire, was the standpoint of Robert. The outcome of this contest clearly brought to light that the empire had ceased to exist as a political and homogeneous unit. Its fabric had already been profoundly shaken and Henry's attempt to assert his overlordship over Robert was the last practical attempt to maintain a position that, however much in agreement with the letter of the law, failed to suit the temper of the time. When Clement V issued his famous bull *Pastoralis cura* he succinctly gave formal expression to a current of political thought which political thinkers had entertained for some time. With this bull the political supremacy of the Holy Roman Empire over kingdoms was formally repudiated by the curia.

This struggle between emperor and king is interesting as an indication not only of the importance of political theory and speculation, but also of the vacillation and quickly changing policy of the papacy which eventually decided the issue. For whilst, in agreement with Innocent III, Boniface VIII recognized

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the French king's *de facto* independence of the empire, but asserted his *de jure* dependence on the empire, a few years later, Pope Clement V repudiated Innocent III's and Boniface VIII's views, and maintained, in general terms, that kings were *de facto* as well as *de jure* independent. Thus not only the French, but also the Neapolitan king were sovereign heads of their kingdoms. After the turn of the century Clement V found himself taking up an attitude which was in complete harmony with that of the vigorous assailants of Boniface VIII.

The many-sidedness of this struggle between emperor and king faithfully reflects the conflicting ideological forces prevailing at the time. On the one hand, we witness the last solemn word of the ruler of the Holy Roman Empire, which was in effect a pathetic cry for times gone by; on the other hand, there is that trend in political theory and speculation which successfully attempted the justification of the actual disintegration of the medieval empire. Robert would never have dared to go so far in his challenge of imperial prerogatives and in obvious defiance of the existing laws, had he not been backed by political theory. And it is this latter to which we owe the modern concept of sovereignty—with all its implications. This ideological movement came to an end in the second decade of the fourteenth century, soon after the victory of the king over the emperor.

Towards the end of the thirteenth century the actual weakness of the empire moved the Austrian Engelbert, abbot of Admont, to bewail this lamentable state of affairs in his *De Ortu et Fine Romani Imperii*. In the preface to his work the abbot allows us an insight into the mentality of contemporary educated men. He refers us to a conversation which he had with some prudent and mature men; the subject of this conversation turned upon the state in which the Holy Roman Empire found itself: some said that the empire was so weak, both in its juristic structure and in its actual power that it would soon cease to exist altogether; the others said that the empire rested upon force, and its absorption by its component kingdoms was only a natural development.[1]

This narrative of the abbot shows the actual state of affairs under Henry VII better than any learned disquisition. The empire as the supreme political unit came to be buried during his reign. But this funeral was far less the result of force or violence than the direct outcome of one current of political thought which, had it not been for the papal pronouncement, might never have assumed the proportions which it actually did assume.

[1] Goldast, *Politica Imperialia*, Francofurti, 1614, p. 754

II

What Henry VII really attempted was the practical realization of the legal axiom embodied in the *Corpus Juris Civilis*, namely that theoretically the emperor was lawful overlord and supreme monarch of Europe: every king and prince was inferior to him. Now, in practice this imperial superiority meant, firstly, that the *crimen laesae majestatis* could not be committed against a king, e.g. the French or Spanish; secondly, that the only authority entitled to issue universally binding rules was the emperor, i.e. that his laws had the same binding force within, say, the French domain, as they had in Germanic lands; thirdly, that the creation of public notaries—those entrusted with drawing up documents to which full legal authority was attached—was the sole prerogative of the emperor; fourthly, that the legitimation of illegitimate children was a privilege reserved only to the emperor; fifthly, that an appeal could be made to the emperor against a sentence of a king. These five items do not of course exhaust the legal and political supremacy assumed by the emperor, but they were some of the most frequently discussed topics.

According to the law, D. 14, 2, 9 and C. I. 1. 1, this supreme authority was indivisible and inalienable: [1] the emperor was 'lex animata', legality and justice personified—every human creature was subjected to his will. The universal overlordship was also recognized by the interpreters of canon law. The glossator of the *Decretum*, Johannes Teutonicus,[2] however, formulated in a succinct form an idea that proved to be of greatest importance. Commenting upon *Dist.* lxiii. 22, he declared this universal overlordship of the emperor as of right, whilst at the same time, he exemplified the words 'per singulas' in this *distinctio* by a reference to France and Spain. He set forth the idea that the emperor was 'dominus mundi',[3] and had jurisdictional authority over every king, unless a king proved to be exempted from the emperor's overlordship.[4] Apparently the famous decretal of Innocent III *Per Venerabilem*, issued in

[1] See the present writer's *Medieval Idea of Law*, London, 1946, pp. 50 ff., 179 f.

[2] Johannes Teutonicus was a pupil of Azo in Bologna, see Johannes's gloss to *Dist.* lxxxv. 4. J. F. Schulte, *Geschichte der Quellen und Literatur des Canonischen Rechts*, Stuttgart, 1877, i. 173, thinks that Johannes finished the *Glossa Ordinaria* before the Fourth Lateran Council, 1215. But F. Gillmann, *Die Entstehungszeit der Glossa Ordinaria zum Gratianischen Dekret*, Paderborn, 1920, pp. 184 ff., and S. Kuttner, 'Eine Dekretsumme des Johannes Teutonicus', in *Zeitschrift der Savigny Stiftung, Kanon. Abt.*, xxi (1932), 142, *id.*, *Repertorium der Kanonistik*, Rome, 1937, p. 93, prove that the *Glossa Ordinaria* was finished a short time after the Lateran Council.

[3] His interpretation of *Decretum*, vii. l. 41, was identical.

[4] 'Unus est enim imperator, ut vii in apibus, quod concedo nisi probent se exemptos ab imperatore.' Cf. also the passage below, p. 5, n. 2.

1202,[1] gave legal expression to an actual state of affairs: Innocent III declared, inter alia, 'insuper cum rex (Franciae) superiorem in temporalibus minime recognoscat'.[2] This decretal opened up a wide field of controversy. One of the first juristic reactions to this decretal came from the pen of the famous canonist Alanus in 1208. In assessing the worth of his dictum we must not, however, lose sight of the fact that he was English [3] and that therefore his interpretation of this decretal may have been somewhat biased. He declared that 'unusquisque enim tantum juris habet in regno suo, quantum imperator in imperio In this interpretation we may well detect the germ, if not more, of the later 'rex in regno suo est imperator'.[4] But the importance of this canonistic utterance does not seem to have been fully recognized, for Bernardus Compostellanus Antiquus, in his gloss on this decretal, still distinguished between a *de facto* and a *de jure* independence. And it was this distinction, first introduced by this glossator, which became the pivotal idea of stalwart imperialists. In his gloss Bernardus said: [5] 'De facto (scil. non recognoscit), de jure tamen subest (scil. rex) Romano im-

[1] Potthast, *Regesta Pontificum Romanorum*, no. 1794.

[2] *Decretales*, iv. 17. 13; C. Mirbt, *Quellen zur Geschichte des Papsttums*, 4th edn., 1924, p. 183.

[3] And not French, as Guido Pancirolus, *De Claris Legum Interpretibus*, Leipzig, 1721, p. 124, seems to think; see Schulte, *Quellen*, i. 188, n. 7. Alanus's *Apparatus* was finished before 1209, see R. v. Heckel, 'Die Dekretalensammlungen des Gilbertus and Alanus', in *Zeitschrift der Savigny Stiftung, Kanon. Abt.*, xxix (1940), 116–357 and S. Kuttner, 'Bernardus Compostellanus Antiquus', in *Traditio*, i (1943), 289, n. 52.

[4] The whole passage runs thus: 'Et quod dictum est de imperatore, dictum habeatur de quolibet rege vel principe, qui nulli subest. Unusquisque . . . (as text) . . . divisio enim regnorum de jure gentium introducta a papa approbatur, licet antiquo jure gentium imperator unus in orbe esse deberet', quoted after J. F. Schulte, 'Die Literaturgeschichte der Compilationes Antiquae', in *Sitzungsberichte d. kaiserl. Akademie*, lxvi (1870), 89–90; cf. also J. Rivière, *Le Problème de l'Eglise et de l'Etat au Temps de Philippe le Bel*, Louvain, 1926, p. 428. Alanus's gloss is contained in his *Apparatus* on the *Compilatio Prima*, De Appelationibus, c. si duobus (in the *Gregoriana*: ii. 28. 7), and anticipated Boniface VIII's *Unam Sanctam*. An idea not unlike that of Alanus is to be found in another *Apparatus* on the *Compilatio Prima*: this *Apparatus* (MS. Lambeth Palace Library 105) is largely based on the work of the English canonist Richard de Lacy (Ricardus Anglicus, see Kuttner, *art. cit.* p. 313, n. 22). The author of this gloss maintained substantially the same as Alanus, but pointed out that the national king's powers rested upon the people, and not on those derived from an emperor: 'Patet reges multos imperatori non subjici . . . nam universitas civitatis multo magis regiam jurisdictionem et imperium conferre potest . . . rex eadem auctoritate, eadem consecratione, eodem crismate inungitur, unde (non ?) potestatis diversitas . . . item teste canone animadversionem plenam habent reges . . .', fo. 196vb, s.v. 'recognoscat'. A detailed report of this manuscript which contains large layers of glosses by Petrus Brito will be made on another occasion. It is difficult to say whether Huguccio, the great teacher of Innocent III, adhered to a similar conception. In his *Summa* he put forward a point of view that might be interpreted in this sense: 'Rex in regno suo edidit edictum, imperator constituit constitutionem, vel idem est rex et imperator, sed rex (est ?) ante imperator coronetur, et idem constitutio quod edictum', on *dist.* ii, c. 4, fo. 118ra of MS. 72, Pembroke College, Cambridge.

[5] *s.v.* 'minime recognoscat'.

perio, vii. 1, in apibus '. And to leave no doubt in the minds of his readers, he declared in his gloss on i. 6. 34 :[1] ' Est autem imperator ille super omnes reges, vii. 1, in apibus, et omnes nationes sunt sub eo . . . ipse enim est princeps mundi et dominus . . . et omnes provinciae . . . et omnia sunt in potestate imperatoris, viii. quo jure.'[2] Thus, theoretically, every kingdom and king, every nation and province, was dependent in its political and juristic structure upon the empire, though, in fact, some may not have recognized this imperial superiority. This non-recognition on their part left their theoretical, legal and political inferiority untouched. This glossator's distinction between a *de jure* dependence and a *de facto* non-recognition facilitated the task of those who had to explain Innocent III's decretal desiring at the same time to uphold the banner of the emperor's universal overlordship.

The imperialist lawyers eagerly snatched at this very welcome instrument. Cynus, perhaps the most consequent and the staunchest of the imperialist lawyers, stated in his lecture on C. I. 1. 1. that the emperor was ' dominus mundi ' and, therefore, ' temporaliter sub imperio omnes populi omnesque reges sunt, sicut sunt sub papa spiritualiter '.[3] He was of course well aware that there were some ' domini ' who would recognize no temporal superior and to those he gave only a *de facto* independence : ' Talis dominus, qui non recognoscit superiorem, est princeps in terra sua de facto '.[4] Even as late as Paulus Castrensis this distinction between *de facto* and *de jure* independence was adduced.[5] Bartolus, who is sometimes thought of as the originator of the doctrine of national sovereignty,[6] also adhered to this distinction. Commenting upon the constitution *Ad Reprimendum*, issued by Henry VII to put into legal effect his ambitions as a true universal monarch, Bartolus came to

[1] *s.v.* ' unde '.

[2] The reference is to the famous dictum of St. Augustine in *dist.* viii, c. 1. Very similar were the opinions of the Spanish glossator and bishop, Laurentius, and of the German, Johannes Teutonicus. Their dicta were incorporated in the *Apparatus* of Tancred on the *Compilatio Tertia*, Qui filii sint legitimi, c. per venerabilem, *s.v.* ' recognoscat ', fo. 193va, MS. C. III. 4 of Durham Cathedral Chapter Library : ' De facto. la. De jure tamen subest Romano imperio, ut vii in apibus. jo '. There is no indication that the Compostellan had influenced Laurentius and Johannes. But the German nationality of the latter may have had some bearing on the formation of his political views.

[3] See also his lecture on C. IV. 6. 3, and on his ideas G. Monti, *Cino da Pistoja*, Pistoja, 1924, p. 176.

[4] See his lecture on C. V. 16. 26, no. 1, as well as his lectures on C. IV. 6. 3 and C. V. 16. 25.

[5] Lecture of Paulus Castrensis on C. 1. 1. 1.

[6] H. Rehm, *Geschichte der Staatsrechtswissenschaft*, Berlin, 1896, pp. 193–5, and E. E. Stengel, ' Kaisertitel und Souveränitätsidee ', in *Deutsches Archiv für Geschichte des Mittelalters*, iii (1939), 1–49, at pp. 39–40 ; and C. N. S. Woolf, *Bartolus of Sassoferrato*, Cambridge, 1913, pp. 154–62, 380–1.

speak of the insecurity and restlessness within the empire. The cause of this sorry state of affairs he found in that the 'imperium fuit prostratum' which gave rise to tyrannical governments and therefore to so many internal upheavals.[1] The greater part of the world no longer obeyed the emperor, and that surely was the real reason for the weakness of the empire: 'Major pars mundi non obedit principi'. But this was, he says, 'de facto, sed de jure secus'. A few lines later Bartolus said in the traditional manner, 'patet, quod imperator recte dicitur dominus mundi'. If any doubt should remain about Bartolus's position it would be dispelled by his lecture on D. 49. 15. 24, where he declared anyone who failed to recognize the overlordship of the emperor to be a heretic: 'Si quis diceret dominum imperatorem non esse dominum et monarcham totius orbis, esset haereticus'.[2] Baldus,[3] too, maintained an attitude in this question which lends support to our assumption that he too must rank amongst those who stood up for the overlordship of the emperor. In a *Consilium*, far too little appreciated, Baldus adopted the view that the emperor was 'dominus mundi': 'Contrarium dicere est sacrilegium'.[4] The fact that Baldus's view has been generally overlooked warrants the quotation of the passage in full.

> Imperator est dominus universalis. Nam in dubio omnis temporalis jurisdictio sua est et de jure ipse immobilis, id est, perpetuus manens. Habet namque imperium universa dictione qui ascendentem videt et descendentem solem et quod ex utroque latere est, id est, meridie et septentrione, et in omnibus insulis, quae usque ad oceani recessus extenduntur, et in omnem terram, quam Romanorum continet lex et catholicae ecclesiae sanctio. *Non enim idolum colimus, sed veritatem.*

Perhaps the strongest defence of the juristic universality of the Holy Roman Empire and the strongest repudiation of the specially privileged position of France accorded in Innocent III's bull *Per Venerabilem*, is contained in one of Boniface VIII's typically strong-worded utterances. When addressing the legates

[1] See Bartolus in his tract *Super Constitutione Extravaganti Ad Reprimendum*, vers. 'Fidelitates', no. 2: 'Princeps est Deus in terris . . . cum imperium fuit in statu et transquillitate, totus mundus fuit in pace et tranquillitate, ut tempore Octaviani Augusti, et cum imperium fuit prostratum, insurrexerunt dirae tyrannides et haec fuit opusculi causa finalis . . .'.

[2] '. . . haereticus, quia diceret contra determinationem ecclesiae, contra testimonium S. Evangelii, dum dicit, exivit edictum a Caesare Augusto, ut describeretur universus orbis, ut habes Luc. 2. Ita etiam recognovit Christus imperatorem ut dominum.'

[3] See O. Gierke, *Deutsches Genossenschaftsrecht*, Berlin, 1881, iii. 639; E. Chenon, 'Le Droit Romain à la Curia Regis de Philippe Auguste à Philippe le Bel', in *Mélanges Fitting*, 1907, i. 195–212; A. Esmein, *Cours Elementaire d'Histoire du Droit Français*, Paris, 1910, p. 339; and N. Figgis, *Churches in the Modern State*, London, 1909, p. 195.

[4] *Consilia*, tom. iii, consilium 218.

of Albert I in Rome, Boniface VIII spoke of the role of the emperor and characterized him in these words: '(Rex Romanorum) est sol sicut monarcha, qui habet omnes illuminare et spiritualem potestatem defendere, quia ipse est datus et missus ad laudem bonorum et ad vindictam malefactorum'. The king of the Romans duly elected by the seven princes, 'est promovendus in imperatorem et monarcham omnium regum et principum terrenorum'.[1] Turning to the subject of the French monarchy Boniface made this far-reaching declaration: 'Nec insurgat hic superbia gallicana, quae dicit, quod non recognoscit superiorem. Mentiuntur, quia de jure sunt et esse debent sub rege Romanorum et imperatore'.[2] As we shall presently see, this claim was in direct contradiction to the opinion of one of his predecessors, Innocent IV, as well as to that of Innocent III's decretal.

III

Let us now turn to the French political writers and jurists whose dicta, owing to the peculiarities of the French political structure, surely must be of great interest to our inquiry. Amongst the French we can discern a minority opinion, characterized by applying the *de facto* and the *de jure* distinction to France, and the majority view rejecting this distinction, either expressly or implicitly, and maintaining the *de jure* independence of the French king. This latter view became prevalent and dominated jurists as well as political writers. Perhaps the earliest representation of the minority opinion was the *Summa Feudorum* of the Marsilian Johannes Blancus who staunchly declared himself for the universal overlordship of the emperor: 'Imperator tenet a Deo imperium et potestatem seu gladium; reges vero habent regna ab imperatore'. Petrus de Bellapertica also belonged to the school of thought upholding the universal state idea. In his lecture on C. I. l. 1,[3] he stated in general terms that 'omnia sunt subjecta imperatori'. Everybody, and apparently

[1] Bull, *Patris Aeterni*, 30 April 1303, and allocution to the Sacred College the same day, see Raynaldus, *Annales Ecclesiastici*, ad annum 1303, § 2; De Marca, *De Concordia Sacerdotii et Imperii*, Paris, 1704, p. 110; *M.G.H.* IV, iv, pars i, p. 133; Woolf, *op. cit.* p. 333. Cf. also the bull of Boniface VIII, 'Nuper ad audientiam' of 15 August 1303, in *Les Régistres de Boniface VIII*, ed. G. Digard and others, iii, no. 5383 (pp. 893–4).

[2] Part of this allocution is also in *Bullarium Romanum*, Aug. Taur., 1857, tom. iv, p. 159, n. 18, where it is slightly different: 'Rex Romanorum omnes universaliter reges praecellit, et hoc dicimus signanter non obstante superbia Gallicana, qui dicunt, quod non debent subjici Romano imperio, sed mentiuntur, per gulam, quia subesse debent, sicut omnia alia regna'. See also Potthast, *Regesta Pontificum Romanorum*, p. 2018, no. 25234. The whole speech is also contained in A. Niemeier, *Untersuchungen über die Beziehungen Albrechts I zu Bonifaz VIII*, Berlin, 1900, pp. 114–18.

[3] Fo. 2 of the edition, Paris, 1509.

even the French king, were *de jure* dependent on, and inferior to, the emperor: 'Debetis scire quantum est de jure, omnes sunt subjecti imperio'. Nevertheless, there are some who are not subjected to the Emperor *de facto*: 'Quidam autem de facto non sunt subjecti'. Now it is interesting to note that Petrus avoided the expression 'non recognoscunt imperatorem'—used by all other writers—instead, he turned the idea of non-recognition which is surely an outcome of the will, into the objectively orientated idea of non-subjection. To those kings, then, the emperor did not wish to issue his laws—'his non vult imperator praecipere'—firstly because they were not worthy of imperial laws, just as the Greeks did not wish to hand over their laws to the Romans before they knew that the latter were worthy of them; and secondly, because the emperor must be on his guard that his commands are not made illusory by non-compliance: this idea makes it abundantly clear that Petrus considers the problem, not from the point of view of non-recognition on the part of the kings, but from that of non-subjection on the part of the emperor. The position, therefore, is reversed in Petrus: instead of a king unwilling to recognize the emperor he visualizes an emperor unwilling to enforce his commands. The expression of this thought on the part of a Frenchman is indeed remarkable.[1] Another representative of the minority opinion was Guilelmus de Cuneo. He, too, seemed to have thought, at least by implication, that *de jure* the emperor was universal overlord. He compared the French king to the Roman princeps and concluded that the same status must also be given to those who do not in fact recognize a superior: 'Idem in aliis regibus, qui de facto non recognoscunt superiorem'.[2]

The overwhelming opinion amongst the French, however, was that, neither in fact nor in theory, could the French monarch be considered inferior to the emperor. But it would be rash to conclude that the French were, so to speak, the originators of French independence and thus of French sovereignty. We must again fall back on the decretal *Per Venerabilem* of Innocent III in which the French non-recognition of a superior in temporal matters was publicly and officially postulated. The germ of the idea of sovereignty was contained in this decretal which only needed elaboration and scientific justification. There is a direct line from this decretal to the fully-fledged theory of sovereignty as we find it later with Andreas de Isernia and

[1] It appears that Cynus did not quite understand the subtlety of Petrus's reasoning. Cynus still had the phrase 'non recognoscunt' and even spoke of those 'qui resistunt', but he adopted Petrus's reasons why the emperor did not enforce his laws.

[2] Guilelmus de Cuneo, *De Diversis Officiis Digesti Veteris*, ed. Brandi, *Notizie interno a G. de Cuneo*, Rome, 1892, p. 126.

Oldradus de Ponte. Before we examine the majority view of the French, it will be advisable to see what other interpretations had been given to Innocent III's decretal. These will show that French political opinion was not as original as it is commonly supposed to have been.[1]

The idea of a universal overlordship of the emperor was effectively challenged by that current of political thought which was initiated by Innocent IV. In his commentary on *Decretales* iv. 17. 13 he interpreted the word 'recognoscat' thus: 'De facto, nam de jure subest (scil. rex Franciae) imperatori Romano, ut quidam dicunt, nos contra'.[2] There was obviously here a challenge to the gloss which introduced the distinction between *de facto* and *de jure*. With Innocent IV the French monarchy was endowed with real, legal and political independence. That this statement of Innocent IV was not an isolated one, follows from his commentary on *Decretales*, ii. 22. 15.[3] Speaking of those who have the right to institute public notaries, Innocent declared that not only the emperor (pope) can create notaries, but also those other kings who have supreme power: 'Credimus tamen, quod alii reges, qui habent supremum et merum imperium, possent idem statuere de tabellionibus, si vellent'.

Whether influenced by Innocent IV or whether acting independently, Guido de Baysio, the famous 'Archidiaconus', put forward in his commentaries on the *Decretum* a view which was hardly distinguishable from Innocent's theory. When discussing the jurisdictional powers of princes Guido maintained that, notwithstanding the general jurisdiction of the emperor, any king had the same powers within his domain. The idea that what is the emperor's is also the king's as regards his own kingdom, emerges quite clearly from this passage: 'Dicas, quod omnia sunt imperatoris quoad jurisdictiones. Sic et omnia, quae sunt in regno suo, sunt regis quantum ad jurisdictionem generalem'.[4] The king enjoys the same juristic and political status within his domain as does the emperor. In order to exemplify his general view on the powers of a king, Guido refers us to the position of the French king. This king, according to

[1] See especially F. Ercole who attempts to prove the exclusively French origin of the famous formula, see his 'L'Origine Francese di Una Nota Formola Bartoliana', in *Archivio Storico Italiano*, lxxiii, part ii (1915), pp. 241–94, particularly at pp. 285–7, and his 'Sulla Origine Francese e le Vicende in Italia della Formola "Rex Superiorem non recognoscens est Princeps in Regno suo"', *ibid.* xvi, ser. vii (1931), pp. 197–238. There is a good summary by F. Declareuil, *Histoire Générale du Droit Français*, Paris, 1925, pp. 427–41, G. de Lagarde; *La Naissance de l'esprit laïque*, ed. 1948, pp. 162-4.

[2] *Commentaria Super Quinque Libros Decretalium*, Francofurti, 1570, fo. 481.

[3] Fo. 280; see also his remarks on *Decretales*, ii. 24. 18, no. 10, fo. 285vo and in the bull *Dolentes* of 12 Oct. 1253, printed in Matthew Paris, *Chron. Maj.*, vi. 293, and Denifle, *Chart Univ. Paris*, i. no. 235.

[4] *Rosarium seu in Decretorum Volumen Commentaria*, Venetiis, 1577, ad xxiii. 8, fo. 317.

Guido, possesses supreme power over all persons living within the kingdom.[1] That was, compared with Innocent's laconic statement, already a remarkable step forward in the direction of the rex-imperator conception.[2]

The last mentioned statement can also be found in Guilelmus Durandus's *Speculum Judiciale*. Durandus, using almost the same words, placed the king on a footing equal to that of the emperor.[3] But concerned as he was with the practical application of the law, Durandus touched upon issues which had not as yet aroused the interests of others. He examined the question of whether a baron who rises against the French king would be guilty of the *crimen laesae majestatis*. He replied in the affirmative; and the reason for his affirmative answer was that 'rex Franciae est princeps in regno suo'.[4] His statement provides not only the famous phrase, but also the clear conception of the king as 'majestas'.[5] All this was, to be sure, against the positive law as laid down in the *Corpus Juris Civilis*. Another problem intimately connected with the question of sovereignty was that of appeal against the king's sentences. Was the king last instance or was a further appeal to the emperor allowable? The latter alternative would have affirmed the emperor's universal overlordship, whilst the former made the king what the emperor was according to the law. Durandus bluntly stated that 'a sententia lata in curia Franciae non appellatur . et sic ibi de facto observatur'.[6] But Durandus restricted the sovereignty of the emperor only as regards the French king; this emerges from another passage where he declared that the emperor was 'dominus mundi'.[7]

[1] 'Unde omnes homines, qui sunt in regno Franciae, sunt sub potestate et principatu regis Franciae et in eis habet imperium generalis jurisdictionis et potestatis', *loc. cit.* Cf. also his remarks in xii. 2. 8, fo. 228, no. 7: 'Quaelibet regio potest sibi imponere legem, et ita Francigenae et Hispani non obligantur Romanis legibus'. To support his dictum in this passage Guido referred to 'L', who may be the already mentioned Laurentius and who may have held differing views. But, as has recently been proved (S. Kuttner, *art. cit.* pp. 291, 309), Guido did not quote directly from the *Apparatus* of Laurentius, the tradition of which is most unsatisfactory, but from the collection of glosses, the so-called *Glossa Palatina*, discovered by Kuttner, *Repertorium*, p. 81, and *art. cit.* p. 290, n. 64. Therefore, too much weight should not be placed on Guido's reference. It should be borne in mind that the *Glossa Palatina* relied extensively on Laurentius, but also on Alanus, Vincentius and many other glossators. It was written between 1210 and 1215.

[2] A similar line of thought is in his *Commentaria super Sexto Decretalium*, I. viii. 3, fo. 41vo. There is no reference to 'L' in this passage.

[3] See *Speculum Judiciale*, Basiliae, 1574, pars iv, partic. iii, *De Feudis*, 'De Homagiis', § Quoniam, no. 28, fo. 320.

[4] With a reference to *Per Venerabilem*.

[5] Bodin's identical conception (*De Republica*, II. ii. 189) was therefore not as novel as it is commonly supposed to be, cf. W. A. Dunning, *Political Theories, From Luther to Montesquieu*, New York, 1919, pp. 87 ff., and J. W. Allen, *History of Political Thought in the Sixteenth Century*, London, 1942, pp. 407 ff.

[6] *Loc. cit.* no. 2.

[7] *Op. cit.* lib. ii, particul. iii, *De Appellationibus*, § Nunc tractemus, no. 1, fo. 839, where he significantly adds: 'praeter regem Franciae'.

Now, what was the attitude of the French king himself? How did he himself consider his position as regards the emperor? We are in the fortunate position of having access to an official dictum of St. Louis, made in 1254. Speaking of the application of Roman law he laid down that it was applied, not because he was bound to apply it, but because he did not want to change old established customs. There is thus no doubt that this king did not feel himself to be legally and politically subjected to the emperor.[1] Perhaps the earliest practical recognition of the juristic independence of France is to be found in a report from the year 1259. It is noteworthy that this report concerned the problem of the *crimen laesae majestatis*. A baron forfeited his privileged position by decree of the French king on a charge of this crime. In this report the consultation of jurisconsults was made the basis of the king's condemnation; they considered that the king could be made the object of this crime.[2] An almost identical view was expressed by the French jurist Johannes de Blanosco (Jean de Blanot, *fl.* about 1255). In his *Tractatus de Actionibus* he maintained that a baron who rebels against the king commits the *crimen laesae majestatis*, the reason being that 'rex in regno suo princeps est'.[3] Though belonging to a later period, it may be worth while to refer briefly

[1] Cf. F. A. Isambert, *Recueil Général des Anciennes Lois Francaises*, Paris, 1830, p. 164: 'Jura scripta, quibus utuntur ab antiquis volumus observari, non quia eorum nos obliget auctoritas seu astringet, sed quia mores eorum in hac parte non duximus immutandos'. Cf. also his exclamation: 'Car li rois ne tient de nului fors de Dieu et de lui', *Les Etablissements de Saint Louis*, ed. P. Viollet, ii. 135, and iv. 22–3. One case has so far come to light in which a French king called himself 'Imperator', and that was Louis VII of France. Cf. A. Teulet, *Layettes du Trésor des Chartes* (Inventaires et documents), Paris, 1863, i. 75, n. 141: 'Ludovicus Dei ordinante providentia Francorum imperator Augustus'. Early medieval kings were rather wont to call themselves emperors, cf. e.g., J. M. Kemble, Codex Diplomaticus Aevii Saxonici 4, no. 727 (year 1018): 'Ego imperator Kunto a Christo rege regum regiminis Anglici in insula potitus'; or *loc. cit.* 3, no. 673 (year 990): 'Famosus totius Brittanicae insulae imperator'. But too much importance should not be attached to these somewhat flamboyant expressions of power. Cf. also Bracton, iii. 9. 3, who said that the king 'parem autem habere non debet, nec multo fortius superiorem'.

[2] See A. A. Beugnot, *Les Olim ou Régistres des Arrêts rendus par la Cour du Roi sous les Règnes de S. Louis (1254–1318)*, Paris, 1839, i. 460, n. iv: 'Rex consuluit plures fidei dignos et jurisperitos, qui habito consilio dixerunt, quod idem A commisit crimen laesae majestatis, et secundum jura scripta amisit jus successionis, ipse et haeredes sui'. For some more practical examples → J. R. Strayer, 'The Laicization of French and English Society in the thirteenth century', in *Speculum*, xv (1940), 76–86, at p. 82 notes.

[3] 'Baro ille, qui insurgit contra regem, videtur incidere in legem Juliam majestatis ex eo capite . . . quod directe videtur fecisse contra principem, nam rex in regno suo princeps est, nam in temporalibus superiorem non recognoscit', quoted by F. Calasso, 'Origini Italiane della Formola "rex in regno suo est imperator"', in *Rivista di Storia del Diritto Italiano*, iii (1932), 226, n. 39. Calasso tries to prove that the phrase was of purely Italian origin, just as Ercole attempts to show that the same phrase was of purely French descent. To attempt to fix the territorial origin of this idea, seems rather futile. Moreover, both these authors fail to show the influence which this particular idea exercised upon the actual events.

to Johannes Faber, another great French jurist in the first decades of the fourteenth century.[1] He asked whether kings were lawfully in a position to legitimate. This power he denied to those kings 'qui superiorem habent'. Others, however, had this right: 'In aliis dicitur idem, quod in imperatore'.[2] The juristic justification for French independence is only touched upon by Faber. In his *Breviarium in Codicem* he doubted whether the emperor was able to derive his position as a universal monarch from the 'jus commune'. Faber believed that the emperor's overlordship was confined to those lands in which his laws were respected. The emperor could not base his position on the 'jus commune extra metas suas, infra quas ei obeditur'. This affords Faber an opportunity to state in general terms that whoever possessed a limited territory for a long time ('ab antiquo') was established there by right and possessed the same powers as the emperor.[3] The reference to actual possession 'ab antiquo' is of course merely the claim, so vociferously put forward by contemporary publicists, that the French monarchy derived its legal position from prescriptive rights. We will turn to this point presently.

An interesting point of view was propounded by Petrus Jacobi, of the late thirteenth century. He claimed that the kingdom of France was not subjected, but—and this is the interesting feature of his exposition—federated, to the empire: 'Hodie vero regnum Franciae non est subjectum imperatori . . . sed est foederatum seu gentes regni Franciae sunt foederatae imperatori'.[4] Not infrequently the freedom of France from the imperial yoke was deduced from the ethymological explanation of the term 'francus', meaning free from the empire.[5]

This summary of the opinions of the French juristic writers indicates that they did not go beyond the mere denial of imperial sovereignty and the mere assertion of French sovereignty and independence. In other words, these jurists maintained the actual, political and juristic independence of France without attempting to prove the correctness of their assertions by historical or political or juristic arguments. It is true that Durandus stated in his *Speculum Judiciale* that the king was emperor in

[1] See F. Savigny, *Geschichte des römischen Rechts im Mittelalter*, 2nd edn. vi. 41–2.

[2] *Super Institutionibus*, Lugduni, 1543, tit. De Nuptiis, fo. 31, col. 2.

[3] Johannes Faber, *Breviarium in Codicem*, C. I. l. 1, no. 2: 'Nec crederem imperatorem fundatum esse de jure communi extra metas suas, infra quas ei obeditur . . . sed tu potes dicere, quod quilibet, qui habet territorium limitatum ab antiquo, sit fundatus de jure communi infra metas eiusdem ad exercendum, in qualibet parte jus, quod in toto universali exercet'.

[4] *Practica*, Lugduni, 1577, 'De Praejudiciis', fo. 45vo; see also Degressalius, *Regalium Franciae Libri Duo*, Paris, 1538, p. 316.

[5] Cf. Stengel, *loc. cit.* p. 38, and W. Berges, *Die Fürstenspiegel des hohen und späteren Mittelalters*, Leipzig, 1938, pp. 76 f.

his domain and that there was no appeal to the imperial court; it is furthermore true that Faber gave the (imperial) right to legitimate to the (independent) kings. But apart from the latter's reference to prescriptive acquisition by the French king, we find no plausible explanation of why the imperial sovereignty was non-existent. Some attempts to justify the assertion of French sovereignty can be found in the writings of the political publicists at the beginning of the fourteenth century. And, to use modern terminology, we may well classify the reasons for the independence of France given by the political writers as belonging to the social-political category, distinct from the purely legal reasons which were set forth with great acumen by jurists belonging to a quite different environment and school of thought. Let us now briefly examine the opinions of the French political writers.

IV

It will be recalled that the quarrel between Boniface VIII and Philip IV provoked a considerable quantity of controversial literature. These writings naturally deal mainly with the alleged rights of the pope in (French) temporal matters. But as there was an influential body of opinion which claimed, on the basis of the allegory of the two swords, that the pope had jurisdictional powers over the emperor and that, consequently, the French king by virtue of his dependence on the emperor, was also subjected to the pope, these political writers [1] were necessarily compelled to touch upon the problem of the political relationship between king and emperor. Nor should it be forgotten that papacy and empire, since the accommodation of Albert I with Boniface VIII, constituted a united front against the French: Albert I had recognized the dependence of his crown on the papacy, and thus presented the French writers with the political implications of this step.

The document entitled *Rex Pacificus*,[2] which attempted to

[1] About the opinions of the French politicians, such as Peter Flote, William of Nogaret, William of Plaisian, and so forth, see Helene Wieruszowski, *Vom Imperium zum Nationalen Königtum* (Beiheft 30 of the *Historische Zeitschrift*, 1933), pp. 157–64.

[2] See G. Dupuy, *Histoire de Differend d'entre le Pape Boniface VIII et Philippe le Bel*, Paris, 1655 (Preuves du differend), pp. 663–83; S. Bulaeus, *Historia Universitatis Parisiensis*, tom. iv, pp. 935 ff. and *Acta inter Bonifacium VIII, Benedictum XI, Clementem V et Philippum Pulchrum Regem Christianum* (Troyes ?) 1614, fos. 164 ff. The editio princeps is contained in the collection of tracts by Durandus, *De Origine Jurisdictionum*, Paris, 1506, 4to. On the manuscript versions, see the present writer's paper, 'A Medieval Document on Papal Theories of Government', *ante*, xli (1946), 183, n. 4. Short references to this tract, the importance of which has not yet been fully recognized, are in S. Riezler, *Die literarischen Widersacher der Paepste zur Zeit Ludwig des Baier*, Leipzig, 1874, p. 141; H. Finke, *Aus den Tagen Bonifaz' VIII*, Münster, 1902, p. 159; C. McIlwain, *Growth of Political Thought in the West*, London, 1932, p. 262; J. Rivière, *Le Problème de l'Eglise*, &c., pp. 274 ff., and R. Scholz, *Publizistik zur Zeit Philipps des Schönen und Bonifaz VIII*, p. 232.

dispose of the extravagant claims of papal supporters, touched upon this problem. The author—or authors (the document was alleged to have been drawn up by the masters of the university of Paris)—did not yet go beyond the position of Faber. The independence of France was asserted—'regnum Franciae non subest Romano imperio'—and definite territorial limits of the empire and of the French kingdom were insisted upon. The basic justification for these territorial limitations of empire and kingdom was found to be the French king's peaceful enjoyment of his possessions; the prescriptive acquisition of the king's rights was claimed to be the title for his independence. Consequently, the French monarchy had limited the territorial sovereignty of the empire. 'Sunt certi limites et fuerunt a tempore, ex quo non extat memoria, per quos regnum et imperium dividuntur.'[1] And which prescription, the author asked, is more legitimate than a period of hundred years' possession?[2] According to the *Rex Pacificus*, this requirement was amply fulfilled by the kings of France who for more than a hundred years had recognized no superior save God in temporal matters: 'Solum Deum superiorem habent in temporalibus, nullum alium recognoscentes superiorem in istis nec imperatorem nec papam'. The right of supreme power had been completely acquired by the French kings: 'Jus summae superioritatis in regno suo totaliter acquisitum'. It is surely not surprising to find that the modern concept of sovereignty had its birthplace in France, even before Bodin in the sixteenth century. But apart from these—certainly original—definitions of the idea of sovereignty there is still no answer in the *Rex Pacificus* to the abstract question, Why was there no empire, or why was the empire superfluous?

An attempt to give some reasons for France's independence is to be found in the tract *Quaestio in Utramque Partem*, by an anonymous author. Like its predecessor, this tract, probably written in 1302,[3] dealt with the power in temporal matters and therefore also touched upon the position of France within the political framework of the empire. The author based the French claim to independence on the medieval French version of the Trojan legend[4] and declared that the Trojans, filled as they always were with great hatred for the Roman empire, refused tribute and were finally repelled from Sicambria where they had settled. Not bowing to Roman rule, they became known as 'franci'. If there are some, the author argues, who on the

[1] Bulaeus, *op. cit.* p. 923.

[2] 'Per praescriptionem legitimam jus acquiritur praescribenti; nulla autem praescriptio magis est legitima quantum ad cursum temporis quam centenaria.'

[3] Cf. R. Scholz, *Die Publizistik zur Zeit Philipps des Schönen und Bonifaz VIII*, Stuttgart, 1906, p. 224.

[4] Goldast, *Monarchia*, tom. ii, p. 102.

strength of Innocent III's decretal *Per Venerabilem* say, that *de facto* the French kingdom is exempted from imperial and Roman rule, but that *de jure* it is part of the empire, an adequate interpretation of that decretal in conjunction with the study of history will convince them that *de jure* also France is independent of the empire, because the French had never been subjected either to the emperor or anyone else.[1] The historical perspective of the tract emerges from the reference to the chronological precedence of France over the empire; in the same context the author boldly declared that France had an 'imperium', and in medieval terminology this concept signified wielding of supreme, uncontrollable and independent power: 'Regnum Francorum prius habuit imperium quam regnum Teutonicorum, lxiii, ego Ludovicus'.[2] But apart from these historical considerations the author of the *Quaestio* also adopts a legalistic point of view. A few lines after the above quoted passage he referred to the gloss on Innocent III's decretal and retorted that the independence of the kingdom had been a fact which had been transformed into a customary right, never impugned by the emperor and always acknowledged by the pope.[3] Consequently, this tract considers king and emperor as equal partners within the European commonwealth: 'Igitur videtur, quod imperator et rex Franciae sunt pares'. All the privileges and rights applicable to the emperor by virtue of his position must also be enjoyed by the king of France, 'qui est imperator in regno suo'.[4]

[1] Goldast, *op. cit.* p. 102: 'Sumamus testimonium summi pontificis ipsius, videlicet Innocentii, "extra, qui fil. sunt leg., c. per venerabilem: rex Francorum superiorem in temporalibus minime recognoscit". Si dicas quia etsi non recognoscit, tamen de jure deberet, respondemus per interemptionem, quod non debet. Quia Franci nulli umquam fuerunt subditi, nec imperatori, nec aliis, sicut probatur ex antiquis historiis, quod post eversionem Trojae xii M. Trojanorum ad partes Pannoniae pervenerunt, ubi civitatem Sicambriam construentes, manserunt ibi usque ad tempora Valentiniani imperatoris, semper infesti Romano imperio. Expulsi vero inde ab imperatore praedicto pro eo, quod tributa Romanis solvere recusarent, juxta morem aliarum nationum, habitaverunt juxta Rhenum in confinio Germaniae et Allemanniae. Quos cum multis proeliis post, idem Valentinianus sibi subjugare tentaret, nec aliquatenus potuisset, appellavit eos Francorum. Et Galliam habitantes denique Franciam appellantes, nec Romanis nec aliis quibuscumque voluerunt esse subditi.'

[2] A similar thought was expressed a few years before this tract was written, by the magister Thomas de Poilliaco (Pouilly) when speaking of the rights of the French king concerning Lyons, see F. Kern, *Acta Imperii Angliae et Franciae ab* A.D. *1267 ad* A.D. *1313*, Tübingen, 1911, p. 198, no. 270, and especially pp. 203, no. 7, 205, no. 17, and 159, no. 271, ll. 9 ff.: 'Rex Franciae omne imperium habet in regno suo, quod imperator habet in imperio . . . nec superiorem habet . . . regem Franciae et alia regna ante fuerunt quam fuerit imperium. . . .'

[3] 'Si dicas, prout dicit glossa "verum est de facto (i.e. Innocent III), sed non de jure, quia de jure debet recognoscere imperatorem, ut patet 4 q. 1, c. in apibus, et extra de elect., cap. venerabilem", respondeo illud factum versum esse in consuetudinem, quae dat jurisdictionem.'

[4] *Loc. cit.* ll. 21 f.

This tract, then, denied the universal overlordship of the emperor and it based this denial partly on historical and partly on legalistic grounds. Instead of adopting this negative standpoint, the tract of John of Paris, *De Potestate Papali et Regia*, went a step further and elicited a positive argument from sociological considerations. John set out from the Aristotelian axiom that human creatures were possessed by an urge to live in a community. According to John, this urge was a natural instinct 'qui ex Deo est', but did not emanate from the divine law itself. In order to live peacefully and in prosperity it was therefore necessary that these communities should elect their own superior who, however, should be different 'secundum diversitates communitatum'.[1] It was a fundamental tenet of John of Paris—as it was one of his fellow countrymen, Jean Bodin, nearly three hundred years later—that the secular power showed far greater complexities and diversities in its structure than its spiritual counterpart. For this reason alone it would not be advisable to have the same idea of universality as there was in spiritual affairs.[2] In the subsequent lines, John of Paris elaborated his thesis and declared, somewhat realistically, that unlike his spiritual partner one supreme ruler could not possibly rule the whole world in temporal matters, since the spiritual power is able to effect its postulates and precepts by words and reaches everyone by the same method: it is, John says, easier to transmit the power of the word than the power of the sword.[3] Thus, John considered the whole problem from the practical point of view of the enforcement of the laws and commands. But he went a step further and emphasized the advisability of different governments for different peoples. There are, he said

[1] Page 111, ll. 42–9: 'Hunc autem ordinem ad unum supremum magis invenimus inter ministros ecclesiae quam inter principes saeculares, quia ministri ecclesiastici divino cultui specialiter deputati sunt domino, tamquam populus peculiaris. Et ideo ex divino statuto est ordo omnium ministrorum ad unum. Non sic autem fideles laici sic habent ex jure divino, quod subsint in temporalibus uni monarchae supremo, sed ex naturali instinctu, qui ex Deo est, habent, quod civiliter et in communitate vivant, et per consequens, ut ad bene vivendum in communi rectores eligant diversos quidem, secundum diversitates communitatum. Quod autem ad unam supremam hierarchiam in temporalibus reducantur, nec ex inclinatione naturali, nec ex jure divino habent; nec eis convenit ita, sicut ministris ecclesiasticis.'

[2] 'Primo quidem, quia sicut in hominibus est diversitas magna ex parte corporum, non autem ex parte animarum, cum omnes sint in eodem gradu essentiali constitutae, propter unitatem speciei humanae: ita saecularis potestas plus habet diversitatis secundum saecularitatem et complexionum diversitatem, quam spiritualis, quae minus in talibus variatur. Unde non oportet esse tantam universitatem in una, sicut in alia.'

[3] 'Potestas spiritualis censuram suam transmutare potest faciliter ad omnes, tam propinquos quam remotos, cum sit verbalis, non potestas saecularis, gladium suum cum effectu transmittere tam faciliter potest ad remotos, cum sit manualis; facilius enim est verbum extendere quam manum.'

different modes of living, according to the differences of climate and geographical situations of the peoples concerned. What may be good for the one nation, may not be so for the other. Let us quote this important passage in full :

> Sic autem non est necesse omnes fideles uniri in aliqua republica communi : sed possunt secundum diversitatem climatum, regionum et conditionum hominum esse diversi modi vivendi et diversae politiae et quod est virtuosum in una gente, non est virtuosum in alia.[1]

Continuing in a sceptical vein, John of Paris denied that there had ever been peace during the reign of emperors, although the periods preceding and succeeding were markedly peaceful, according to John's reading of history ; imperial rules were characterized by patricide, fratricide and matricide—an assertion in striking contrast to those exuberant glorifications of imperial and universal government which appear in the contemporary *Monarchia* of Dante.[2] The conclusion which John of Paris reached on this point is not therefore surprising : it is better, he concludes, to have several kingdoms than one comprising the whole world : ' Melius est plures pluribus regnis dominari quam unum toti mundo .' [3]

John of Paris's tract marked a decided advance in political thinking as compared with contemporary juristic thought. He plainly envisaged regional kingdoms whose rulers embody supreme power. He flatly denied the possibility of a universal empire, because of the difficulties of enforcing a universal overlord's commands in remote places—and also because of the necessity of adjusting the government to the exigencies and peculiarities of various nations, essentially and fundamentally different on account of diversities of climate, geographical position and peculiar social conditions.

V

The idea of a universal overlordship exercised by the emperor as the ' dominus mundi ' had indeed received shattering blows. The practical test-case had yet to come : could the emperor actually maintain his overlordship over the kings ? It is, we think, symptomatic of the state of political thinking that ideas, such as those we have examined, should have been so loudly propounded at a time when an emperor was making strenuous efforts to uphold the position which the abstract letter of the law bestowed upon him. The fabric and structure of the political

[1] *Loc. cit.* p. 112, l. 7.
[2] *Monarchia*, I. xvi ; II. ii, &c.
[3] *Loc. cit.* p. 141, l. 23.

edifice, skilfully assailed by these French political and juristic writers, had been undermined just at a time when the emperor would have needed all available forces to translate the idea of overlordship into a practical reality. Yet the final blow to this imperial edifice did not come from the French writers, but from those in the southern half of the Italian peninsula, from the Neapolitan school of law. And it is, moreover, significant that the emperor and the idea of a universal empire suffered a decisive defeat at the hands of the Neapolitan king, Robert of Naples. The assumption that Robert would have challenged the imperial authority without the necessary legal and political advice can certainly be dismissed. On the contrary, the very fact that he staunchly maintained an uncompromising and unbending attitude against a far more resourceful emperor, and that he allowed affairs to drift to a point from which there was no return, suggests that, although he was the less well equipped in material resources, he was the better armed with legal and political arguments furnished as they were by the jurists of the brilliant Neapolitan school. And it was precisely these jurists who carried out the successful theoretical onslaught upon the empire. Naples claimed a position not unlike that of France: the Neapolitan kingdom was a fief of the papal curia and for this reason, if for no other, the kings maintained that they were exempted from imperial rule and overlordship. But legal proof and a test case had not yet been furnished. Now it is interesting to note that at the very same time as the French political writers vociferously impugned the universal overlordship of the emperor and established a case for French independence, the Neapolitan jurists busied themselves with exactly the same problem, seen of course from their own (Neapolitan) point of view. Whether or not the French stimulated the Neapolitans or whether the former were influenced by the latter, cannot now be decided. The one fact that can be safely asserted is that there was a close intercourse between Naples and France, owing to the rule of the house of Anjou. Let us now turn to an examination of the ideas as set forth by the southern jurists.

A considerable time before the French writers challenged the imperial universal authority in the interests of France, the glossator of the *Constitutiones Utriusque Siciliae*, Marinus, elaborated (about 1275) the legal and political position of the Sicilian king and his relationship with the emperor. Marinus wrote lucidly and, unlike later writers, without compendious references to passages of the Old and New Testaments. His exposition was unambiguous and uncompromising as regards any superior authority on the part of the emperor. The state of mind of this glossator is revealed by his opening words on this topic:

'Audacter dicimus'. For him there could be no doubt that the Neapolitan king was emperor in his own domain: he was therefore entitled to legislate on all matters with the same powers as the emperor himself, and even against the universally valid Roman law—all this by his own right: 'Sicut imperatoris, ita regis est proprium condere legem'. Royal authority, according to this glossator, was by no means inferior to imperial authority, the difference between them being only nominal: 'Non minorem authoritatem regiam quam imperatoriam arbitremus, scilicet imperatorem ac liberum regem indistincte dicimus dignitatis . . . licet sit distincte in nomine'.[1] Consequently, the term 'princeps' employed in the law books, was applicable not only to the emperor, but also to the king: 'Principis nomen est commune tam regi quam imperatori'. The powers with which Marinus invested the king, were identical to those of the emperor. Apart from the already mentioned right of legislation, even against enactments of Roman law, the king had also the right to legitimate and the right to have his own fisc. Moreover, Marinus denied an appeal from the royal curia to the emperor, the king being supreme judge with no temporal superior: 'A rege Siciliae appellari non potest . . . rex Siciliae superiorem non habet'.

Just as some French writers were anxious to refute the emperor's legal claims to universal overlordship by historical arguments, so did our glossator attempt to disprove the legality of the alleged universal overlordship by the same method. He asked, To what did the empire of the Romans whose successor the Holy Roman Empire was, owe its existence? Now, he said, anyone reading through the deeds of the Romans must needs come to the conclusion that the Romans acquired their empire through sheer force of arms. This subjugation and oppression of foreign peoples was a factual phenomenon rather than a legal one. Apparently the Neapolitan glossator rejected the idea of right being derived from might. 'Certe', he said, 'quicumque Romanorum gesta evolvat, non inveniat, quod aliter quam per armorum fortitudinem solam, et sic de facto potius quam de jure, Romani cives et imperatores sibi regna et gentes subjugaverunt . . . opprimendo videlicet, qui sua imbecillitate eorum ditioni coeperunt esse subjecti'. Indubitably gratified by the diminution of the authority of the Roman empire, the glossator sarcastically remarked that this decrease in power did not happen 'sine optima ratione'. The Romans had merely lost an illicitly acquired empire and if it was a crime to recede from Roman rule, it was also a crime to establish an empire by force: 'Et sic paria

[1] Cf. with this an incidental utterance of St. Bernard in his epistles, Migne, *Patrologia Latina*, vol. clxxxii, col. 294: 'Omnis, qui in Sicilia regem se facit, contradicit Caesari'.

delicta mutua compensatione tolluntur'. In short, the Sicilian king is the 'princeps in regno'.[1]

This brief exposition leaves little doubt as to the attitude of influential circles in the southern law school. The famous Neapolitan professor, Andreas de Isernia, was, if possible, still more outspoken.[2] He also commented upon the *Constitutiones* and wrote, probably just at the turn of the century, commentaries on the feudal laws. Both these commentaries set forth his ideas on the present topic. A short sketch of his views may shed further light on the thoughts of those scholars by whom the king was influenced. Andreas's exposition does not show the same terseness and conciseness as that of the glossator Marinus. In the true dialectical manner Andreas dealt first with certain views opposed to his political thoughts and dogmas. He singled out the canonists Johannes Teutonicus and Hostiensis (Henricus de Segusia) as the representatives of a school of thought insisting upon the unity and supreme sovereignty of the imperial government. It will be recalled that Teutonicus, the glossator of the *Decretum*, maintained that there was a *prima facie* presumption for every king's being under the emperor's power, unless an exemption from this rule was found. If Johannes's opinion were followed, Andreas argued, imperial laws should therefore be observed. In that case, he asked, was everyone bound by the feudal laws? To this imperialistic-universal view of the canonist the Neapolitan professor and counsellor of the king [3] replied in the following way:

Firstly, as regards the origin of the emperor's dominion, it must plainly be stated that the Roman empire subjugated 'the world' solely by the use of force. This, Andreas said, follows clearly from a perusal of the chronicles. He believed he found support for his view in *Dist.*, xxiii. 1, and in *Decretales*, i. 6. 34. With a reference to St. Augustine's *De Civitate Dei* the Sicilian complained of the injustice of free individuals being subjugated against their own will. For Andreas therefore all 'Romani principes' must be classed as 'improbi'. Secondly, a number of kings had never recognized the emperor as their overlord, and the exemption from imperial rule mentioned by the gloss

[1] Calasso, *loc. cit.*, goes too far in deducing from certain expressions the exclusively Sicilian (Neapolitan) origin of the idea, particularly his interpretation of some utterances of Carolus de Tocco in the *Apparatus ad Lombardam* appear artificial. It is always difficult to ascribe the paternity of certain ideas to one man or to one country. That there was a close connexion between Sicily and France owing to the Angevin rule, cannot be denied, and it is this undeniable fact which largely explains the simultaneous exposition of anti-imperialist views.

[2] About whom see L. Giustiniani, *Memorie Storiche degli Scrittori Legali del Regno di Napoli*, Naples, 1787, ii. 161–8.

[3] See H. Finke, *Acta Aragonensia*, ii, no. 442 note.

can surely be presumed in the case of those kings who for more than a hundred years had paid no homage to the emperor. What presumption could be more effective than one extending over more than a century? This question reminds us clearly of the almost identical wording of the *Rex Pacificus*. Consequently, 'ex cursu temporis praesumeretur exemptio'.[1] Only one right could not be acquired by prescription, Andreas continued, and that was the papal right of demanding submission from everyone, because that right was derived directly from God, and has also been instituted by Christ Himself. The nationalistic-conservative outlook of the Sicilian professor appears perhaps best in this point. He insisted upon the fixed character of the contemporary political structure of the empire, that is to say, the empire in its 'present' form could not be changed. For although in the past kings acquired the freedom of their kingdoms from imperial rule, this prescriptive acquisition could not take place in future. The reason for this view was that prospective free kings had not protested against imperial rule and therefore 'purgatum fuit vitium ex voluntate sequenti'.[2] Thirdly, Andreas avowed that if Johannes Teutonicus and others based their universal-imperialistic views upon the passage *In apibus*,[3] this interpretation was too narrow and superficial. It was a purely arbitrary explanation of this text to infer from it the universal overlordship of the Holy Roman Empire. For, as Andreas observed, this passage can refer only to 'just' empires; moreover, each province can have its own monarch: 'Et quaelibet provincia habet suum regem, qui suus monarcha est'. Although the church and the pope 'approve' of the emperor, in so far as he is the defender of the faith, they do not approve of his aggressions merely because he is the emperor.

Thus, according to Andreas, there are free kings who had protested against the forceful subjugation under imperial rule in good time, and one of these free kings was the Neapolitan. 'Illi, qui se non submiserunt Romano imperio, dicebantur liberi.' Since they had no superior, no appeal against sentences of the royal curia was allowable. These free kings were not bound to accept imperial laws, of which the Roman was the outstanding example. If imperial laws were in fact applied, this would merely mean that the free king had recognized them as reasonable

[1] Andreas de Isernia, *In Usus Feudorum Commentaria*, Lugduni, 1579, 'Praeludia', no. 35, fo. 4 vo.

[2] *Op. cit.*: 'Aliis vero, qui de novo vellent se eripere in libertatem, videtur obstare, si imperium diceret, quod praedecessores tui voluntarie se imperio submiserunt, quod probabitur ex diuturnitate temporis . . . nam etsi verum est, quod armorum potentia a principio subjugavit sibi Roma provincias, post voluntarie elegerunt sibi in regem . . . purgatum fuit vitium ex voluntate sequenti.'

[3] *Decretum*, vii. l. 41.

laws; this recognition would not imply that their imperial character was the basis of their acceptance and application by the king.

It is quite in harmony with these foregoing considerations of Andreas de Isernia that he employed the phrase: 'Rex est monarcha in regno suo'. The question, however, arises, why a universal monarch was not to be preferred to a number of kings. Certainly, the political structure of the empire would have been simpler, if, as the law books laid down, there had been one single monarch. This consideration must also have been at the back of Andreas's mind, and the reason he gave for his rejection of the one single emperor, was the practical observation that kingships were hereditary: kings were far more anxious to do their best for their heirs than were emperors who were elected and had therefore no specific reason for having the prosperity of their successors at heart. 'Curant (*sc.* reges) de utilitate regni propter filios, qui sunt reges sicut et ipsi . . . imperatores autem non sic, quia electione, non successione.' In order to make his views quite plain, Andreas elsewhere declared that the elected Teutonic princes did not care for the well-being of Italy, only for that of Germany 'as we see happen in our own days'.[1]

Now, what rights had the kings according to Andreas's conception? This question afforded him an opportunity to cross swords with Hostiensis who denied kings the rights of coining money, changing its value, concessions of tolls and other taxes, and so forth, and declared these rights, the so-called *regalia*, the sole prerogatives of the universal monarch. Andreas contested this opinion: according to him, every king was monarch in his own kingdom, and therefore free kings had the same rights as the Roman emperors: 'Liberi reges habent illud jus, quod Romani principes'.[2] His argumentation was based upon the conception of the emperor as the king of the Romans before his coronation. For prior to the ceremony of coronation the emperors were simply kings of the Romans. And yet even in this capacity they had, according to Andreas, 'majestas', that is to say, supreme political power and the subsequent coronation did not increase their powers.[3] Andreas argued that anyone who had read history, must admit that there were many German and Roman princes who had not been crowned

[1] *Usus Feudorum*, 'Quae sunt regalia', Rubrica, no. 64, fo. 303vo: 'Non curant Theutonici electi ad imperium de jurisdictione Italiae, ut videmus diebus nostris, curaverunt de Alemannia; curare debent non minus de Italia'.

[2] *Usus Feudorum*, *loc. cit.* no. 77 fo. 307vo; *loc. cit.* 'Monetae', no. 18, fo. 291vo: 'Reges liberi habent illud posse quod imperator in imperio'.

[3] On the various views concerning the idea of coronation, see the present writer's *Medieval Idea of Law*, pp. 175–80.

as emperors and who still exercised all rights appertaining to them without regard to the formal act of coronation.[1] Moreover, the study of the Bible proved conclusively that the ideas of empire and emperor were alien to the Old Testament, where only kings could be found. The idea of an emperor was a relatively new one, and a Christian emperor could not be found before Constantine. Consequently, the historical perspective would lend no support to the .claims of a universal monarch. In other words, the position of the emperor was a purely formal one, and the rights usually ascribed to him alone must necessarily be attributed also to the free kings. And these rights embodied the supreme political and legal power.

This sovereign position of a free king entailed, above all, the possibility of committing the *crimen laesae majestatis* against his person. The question whether a king could be the object of this crime, was therefore a test case as to whether the concept of sovereignty was grasped in its full implications. And Andreas speaking of this crime said some 'moderni' declare 'crimen laesae majestatis non cadere in regem'. He was very emphatic on this point and roundly stated that this view 'nulla ratione defendi potest'.[2] The other rights commonly thought of as the prerogatives of the emperor as the sole bearer of political and legal plenitude, should also be attributed to the free king. We have already mentioned that Andreas would allow no appeal against a sentence of the royal curia. One point in his theory dealt with an aspect of international law, that is, the right of free kings to wage wars: if waged against the emperor, they would not be rebellions, but merely wars between sovereign rulers. The creation of magistrates and other public officials was no longer the sole prerogative of the emperor, but that of the king within the territory of his kingdom. The Neapolitan scholar, in short, restricted the imperial power to those territories over which it could be effectively exercised. The emperor became a mere king over a certain territory which, as Andreas sarcastically remarked, was 'nowadays moderate in its size'. As regards the scope of powers, Andreas recognized no difference between an emperor and a king: each is restricted to his own territory. 'The king can do in his realm what the emperor can do within imperial territory.' That is the implication of the important passage in which the Sicilian professor declared: 'Rex

[1] Andreas de Isernia's *Proemium Super Constitutionibus Regni*, in *Constitutiones Regni Utriusque Siciliae:* 'Sed certe, antequam coronentur Romae imperatores, sunt reges et habent majestatem et fiscum, et multi fuerunt reges Alemanniae et Romanorum, qui non fuerunt incoronati imperatores, sicut patet ex chronicis tempore jurisconsultorum et imperatorum, qui fecerunt leges Codicis. Imperator erat (!) dominus totius mundi. . . .'

[2] *Loc. cit. Proemium* (without pagination or division in sections).

poterit in regno suo, quod imperator in terra imperii, quae hodie modica est in Italia, non habet nisi Lombardiam et illam non totam, et partem Thusciae . . . *liberi reges tantum habent in regnis suis quantum imperator in imperio* '.[1]

VI

The French publicists were on the defensive and merely asserted sovereign rights of the French king. The Neapolitan elaborated the idea of sovereignty theoretically and pushed this idea to its logical conclusion. Hence the emperor ceased to be a 'dominus mundi', and he was refused any pre-eminent powers outside his own (German) dominion, whilst, on the other hand, the free king embodied all those prerogatives which, by virtue of his universal overlordship, used to be attributed to the emperor alone. The Holy Roman Empire as a universal monarchy had not only practically, but also theoretically terminated. The emperor's power was limited to a certain territory only. It is against the background of such views that we must visualize the contest between Henry VII and Robert of Naples. When Henry charged Robert with the *crimen laesae majestatis*, the latter claimed that he too was a sovereign, inferior to nobody and could not thus be cited and tried by an equal. Robert had on his side not only the facts, but also the theory current at his capital's seat of learning. The contest between him and the emperor concerned a purely legal-political point which had been decided long before in favour of the king. The case against Robert rested on the assumption that he was subject to the laws and orders of the emperor as the universal overlord. In substance the charge maintained the perpetration of the *crimen laesae majestatis* against the emperor in that he incited imperial enemies in Lombardy and Tuscia to revolt against the empire, that he had concluded treaties with them and finally that he had occupied imperial territory illegally and expelled imperial officials. Whether or not these charges were true, it is not our task to investigate. What is of interest and importance is the fact that Robert, summoned to appear before the emperor through the imperial edict of 12 September 1312,[2] completely ignored the summons. What is of still greater interest is the law passed by Henry VII on 2 April 1312 in which the universal overlordship of the emperor was solemnly re-affirmed: it was this law upon which the subsequent proceedings and the eventual condemnation of Robert were based.

The very fact that the emperor saw himself compelled to issue

[1] *Usus Feudorum*, 'Quae sunt regalia', Rubrica, no. 2, fo. 286.
[2] See *M.G. Const.*, iv, no. 849, p. 857.

a law in which he declared that 'every soul was subject to the emperor without any exception'[1] sheds a significant light upon imperial claims. After all, were the texts in the law books insufficient to support the charge against Robert? Did they not plainly express the idea that the emperor was 'dominus mundi'? It was assuredly superfluous to declare in the second title of this law that those 'who plot against the prosperity of our empire' or attack 'our honour' were to be declared rebels and traitors.[2] Moreover, the reference to imperial officials makes this law appear as an *ad hoc* manifestation of imperial legislation. The reason for the promulgation of this law can be no other than the realistic recognition of the emperor that the functions attributed to him by the law books were no longer validly upheld. To be sure, there was nothing new in this law, except the pomposity with which the imperial overlordship was re-affirmed: this law constituted an attempt to revivify, recapture and resurrect the position of the emperor as the universal overlord. Strictly speaking, the legal basis of the proceedings and of the sentence against Robert could not be impugned, but their unreality deprived them of even a shadow of an enforceable claim. That sentence was the last solemn word of the Holy Roman Empire, and the law upon which it was based, was the last law carrying the flag of imperial and universal legislation. Although expressly declared a rebel by this law, Robert did not appear: in his absence he was found guilty of high treason, his goods were to be confiscated and he himself to be deprived of all dignities.[3]

VII

It was unfortunate for the emperor that the blow he aimed at Robert also hit the papacy. Perhaps events might have taken a different course if his opponent had not been a Neapolitan king. For the kingdom of Naples was a papal fief and the pope claimed supreme jurisdictional powers in this southern kingdom. It is not therefore difficult to perceive that the imperial claim to universal overlordship which might otherwise have found a willing supporter in the papacy, greatly antagonized Clement V: already

[1] See *Extravagantes* (XI Collatio), tit. i, 'Ad Reprimendum'. The resemblance with Boniface VIII's claims in *Unam Sanctam* is too striking to be overlooked. Henry must have found support in the views expressed by King Frederick III of Trinacria, see *M. G. Const.*, iv. no. 1248.

[2] Here again the resemblance with Boniface's diction at the end of *Unam Sanctam* is striking. Cf. also F. Bock in *Römische Quartalschrift*, 1936, pp. 105ff, 169ff.

[3] For an account of these events, see W. Götz, *König Robert von Neapel*, Tübingen, 1910, pp. 16 ff., &c.; see also *M.G. Const.*, iv. 2, no. 947, pp. 991 f.; no. 1252, pp. 1362 ff.; no. 1253, pp. 1369 ff. For anonymous writings against Henry, see especially *M.G. Const., loc. cit.* no. 1249, pp. 1317 ff., no. 1250 questio vii, p. 1335, no. 1251, pp. 1342 ff.

friendly disposed towards the French king—the pope had by this time taken up residence at Avignon—Clement V was considerably perturbed by this law of Henry VII and still more by Robert's condemnation. In other words, Henry also claimed the Neapolitan kingdom as his own territory. Furthermore, the French cannot but have felt the sting directed against them through that law and sentence. With one stroke Henry drove the pope and the French into the same camp: Henry had to face papal antagonism aroused by his claims, as well as the obviously hostile sentiments of the French ever highly sensitive to the possibility of a powerful and really universal empire.[1]

As the papal interests were directly at stake, the pope was bound to act, if he did not wish the imperial treatment of Robert to become a dangerous precedent. The challenge thrown out to Henry by the pope's bull *Pastoralis cura* also worked effectively in the interests of the French monarchy: the pope did the work for the French king who remained cautiously in the background, although his interests were at least as much affected as those of the pope. This bull denied the universal overlordship of the empire, not on grounds of political or legal theory, but simply because the papal interests were threatened by Henry's claim. But by declaring the sentence against Robert null and void, the pope acted in the interests of those who welcomed the disintegration of the empire as a universal monarchy. The coincidence of papal interests with the anti-imperial forces is one of the most fascinating aspects of the political life in the later middle ages: the pope found himself, compelled by circumstances, driven into the ideological company of precisely those who only a few years before had assailed his predecessor, Boniface VIII, in the most vituperative manner.

Pastoralis cura, incorporated in the Clementine collection of papal decrees,[2] briefly recalled the circumstances which had led to Robert's condemnation as rebel, traitor and enemy of the empire. This sentence, Clement V stated, was not based upon justice, but 'upon the step-mother of justice'; it was an arbitrary decision and proceeded from the overhastiness of the judge himself. After some purely legalistic arguments purporting to show that the citation of Robert was legally invalid—we will

[1] On contemporary papal policy see F. Baethgen, 'Der Anspruch des Papsttums auf das Reichsvikariat', in *Zeitschrift der Savigny Stiftung, kanon. Abt.* x (1920), 168–268, at pp. 241–2, and H. Kämpf, *Pierre Dubois und die geistigen Grundlagen des französischen Nationalbewusstseins um 1300*, 1935, pp. 87–8, and *passim*. On the character of Clement V as a politician see G. Lizerand, *Clément V et Philippe le Bel*, 1907, pp. 375 f., 385 ff. and F. Bock, *Reichsidee und Nationalstaaten*, 1943, p. 140.

[2] *Clem.* ii. 11. 2. In a public disputation Cynus called this bull one more error of the canonists, see Bartolus in his gloss on *Qui sint Rebelles*, versus 'Per Edictum'. Cf. also *M.G. Const.*, iv, no. 1166.

return to this point shortly—the pope, in somewhat heated and emotional tones, exclaimed that the procedure adopted by the emperor must be classed as despicable and detestable. The political reasons which Clement V set forth to demonstrate the invalidity of the sentence because of the invalidity of the citation, are of greater interest to us than the legalistic arguments. According to the bull, the emperor could not summon the king 'extra districtum imperii'; nor could an emperor use force to bring a king to book 'extra imperium'. Although this line of argument was familiar since Andreas de Isernia's lucid exposition of the theory of distinct domains, and although this conception was identical with the French ideas of kingship, it is nevertheless remarkable that Clement V adopted it as though it had been an unquestionable and uncontroversial point. Yet the motive for Clement's declaration appears to us less political than personal.[1] Indignantly he declared in the bull that he himself was the natural judge of the Neapolitan king—'nos quoque regis ordinarius judex'—and that a valid citation would have presupposed his own consent, but he was never even requested to consent to the procedure. No earthly reason could be adduced to prove that the king owed allegiance to Henry VII or that the latter was his superior: 'Nulla ratione terrarum debitam superioritatem habebat'. It would be idle to deny an emperor the right to punish crimes committed 'intra districtum imperialem', provided that the criminal stayed within imperial territory. Jurisdictional powers were denied to an emperor for crimes perpetrated 'extra districtum imperii'. In short, since the emperor had no powers whatever over the king—'cum nullam potestatem haberet imperator in regem'—the pope felt himself compelled, thereby maintaining his own superiority over the emperor, to declare the sentence pronounced at Pisa to be null and void and to deprive it of all consequences; as far as Clement V was concerned, Robert emerged unscathed from his quarrel with Henry VII.

VIII

The position adopted by Clement V was a concrete application of the theoretical views set forth by Andreas de Isernia. It

[1] This is also borne out by some statements quite independent of each other, see, e.g., S. Schard, 'Hypomnema', in Petrus de Vineis, *Epistolae*, tom. ii, p. 303: 'Clemens odio Henrici incensus . . . Rupertum regem Apuliae, quem is juridico ritu laesae majestatis condemnarat, hostemque imperii judicarat, defecit, atque sententiam in eum latam non tam jurisprudentia quam odio imperatoris improbavit atque rescidit'. The curialist partisan, Johannes Andreae, in his gloss on *Clementinae*, ii. 11. 2, also speaks of 'odium capitale' and 'inimicitia mortalis' between Pope and Emperor. Cf. also Clement's own words in *Clem.* ii. 9, cap. un.

was he, it will be recalled, who first spoke unambiguously and plainly of territorial limitations. Therefore, the term ever recurring in the bull—'extra districtum imperialem'—meant the solemn declaration by Clement V as Pope that Emperor Henry VII was no more 'dominus mundi' and that there was neither theoretically nor practically a world-embracing empire. But it certainly would be rash to assume that Clement himself had direct knowledge of Andreas's views. It may even be doubted whether Clement himself had drafted this decree. But it is a certainty that, before the bull was issued, Clement V consulted a jurist of great fame, Oldradus de Ponte. This we gather from the *Consilium* 43 of Oldradus which expressly dealt with the validity of Robert's summons by Henry VII. This *Consilium* was given specifically for the case in question, and was in many parts identical to the tenor, diction and wording of the bull.[1] Oldradus concluded that the citation of Robert was invalid, because he had not had the 'facultas defendendi': furthermore, he was outside the jurisdictional district of Emperor Henry VII. Above all, Oldradus denied that an emperor had *plenitudo potestatis*, and his powers were restricted to a smaller district. As to the charge itself, Oldradus logically enough declared that the *crimen laesae majestatis* could not be committed by Robert, since Henry VII had no 'major potestas'. Consequently Robert should have been acquitted of high treason.

The case of Robert against Henry apparently stimulated Oldradus de Ponte to examine the whole idea of a world empire afresh, on a purely theoretical plane and without any reference to the actuality. It may have been argued against him that his *Consilium* 43 was drawn up at the special request of Pope Clement V and his cardinals and that it had therefore only an application limited to the case in question. It is true that this *Consilium* was negative in so far as it denied the validity of citation and of judgement. Scholar and thinker as he was, Oldradus felt bound to investigate the whole imperial idea of the state, its theoretical foundation and legal basis. His views are contained in his *Consilium* 69.[2] It has been suggested that Oldradus was the originator of the idea of sovereignty,[3] but this claim cannot be supported by the evidence available. Nevertheless, there are certain features in his treatment of the

[1] See also E. Will, *Die Gutachten des Oldradus de Ponte*, Berlin and Leipzig, 1917 (in *Abhandlungen zur mittleren und neueren Geschichte*), p. 49.

[2] It is also printed by the author of the *Somnium Viridarii* which is in Goldast, *Monarchia*, tom. i, pp. 58 ff. About its probable author see Scholz, *Publizistik*, p. 138, and F. Schulte, *Quellen*, ii. 372, n. 6. The contents of the *Consilium* were noted by Scholz, *Unbekannte kirchenpolitische Streitschriften*, Rome, 1911, p. 214, and by F. Aistermann, *Beiträge zum Konflikt Johanns XXII mit dem deutschen Königtum*, Bonn, 1909, p. 27, and by Stengel, *loc. cit.*

[3] See Bodin, *De Republica*, i. 4, and Woolf, *op. cit.* pp. 380–1.

problem which are somewhat novel and warrant a closer examination. His views were an amalgamation of the current French and Neapolitan ideas, though strangely enough he never referred to either of them. And this lack of reference on the part of Oldradus may have given rise to the assumption that the idea of sovereignty was born with him. In fact, however, he stood not at the beginning of an ideological movement, but at its end. No doubt Oldradus tackled the problem independently and with some justifiable claim to originality, but the cardinal tenets as well as the phrase ' rex in regno suo est imperator ' were by no means Oldradus's own. It should be mentioned that his *Consilium* was made the target of many abusive utterances as late as the middle of the sixteenth century.[1]

He chose as the heading of his *Consilium*[2] the title ' De Majoritate et Obedientia ', and the very first words of his essay put the whole problem into a neat question : ' Consuevit dubitari, an omnes reges et principes debeant de jure subesse imperatori ? ' This beginning reflects the state of mind of political thinkers at the time of the contest between Henry VII and Robert of Naples better than any lengthy tracts. Was the emperor *de jure* overlord ? This *Consilium* may conveniently be divided into three parts. In the first part the author, in typical medieval fashion, answered his question in the affirmative—' et videtur, quod sic, mundi enim dominus est ',[3] and marshalled all those arguments which may be adduced to support this answer. The second part contained his own constructive exposition and theoretical explanation as to why an emperor was not universal overlord and why kings had the powers usually attributed to an emperor alone. In the third and last part Oldradus set forth arguments purporting to destroy those of the first part. It will be convenient to select the more important points of the first part and, in order to avoid repetition, to set against them the counter-arguments of the third part, before we attempt to reconstruct the second part. Now the very first argument adduced by Oldradus to prove that the emperor was overlord, was brushed aside : the emperor could not claim to be overlord, since a number of passages in the law books know of princes who were not ' subditi ', and these were called ' friends ', ' confederates ', ' kings ' and the like.[4] An argument popular with

[1] See, for instance, Michael Ulcurrunus in his *Tractatus Regiminis Mundi*, contained in *Tractatus Illustrium Jurisconsultorum*, tom. xvi, fos. 103vo–130vo, particularly at no. 9, fo. 117, and no. 1, fo. 121vo *seqq.*; this author devoted 9 folio columns, mainly consisting of abusive remarks about Oldradus de Ponte. See also Franciscus Zoanettus, *De Romano Imperio*, also in *Tractatus*, *loc. cit.* fos. 21–30, especially no. 229 at fo. 28vo. Ulcurrunus was imperial counsellor at the court of Charles V.

[2] Fos. 23vo–25 of the edition Lugduni, 1550.

[3] With a reference to the well-known passages in Roman law.

[4] No. 9 with a reference to D. 49. 15. 19 and C. I. 1. 1.

the imperialists was that deduced from the *Decretum*, vii. i. 41, and Oldradus himself declared that a plurality of rulers would be a monstrosity—' si sunt multi, erunt multa capita quasi monstrum '—and they would easily be given to factions and quarrels ; therefore, so runs his arguments, it was found necessary to confer the government on one individual, and not on a plurality of individuals, as this canon was usually interpreted. But Oldradus challenged the validity of this argument : he would not say that there were to be two kings within one and the same kingdom ; what he would say, however, was that this legal text did not declare one ruler to be overlord. ' Nec ego dico ', Oldradus stated, ' quod in uno regno sunt duo reges, sed in quolibet regno unus rex . . . unus apes non est rex omnium apum de mundo '. Herds of animals, too, did not follow one leader only, but ' una congregatio sequitur unam, et alia aliam '. Consequently, the imperial overlordship could not be based upon this canon law text, and, therefore, ' in quolibet regno erit unus rex '.

The imperialist jurists furthermore could refer to the prevailing ideas of the origin of the empire, as laid down in *Collatio* VI : God has sent the emperor into the world as a ' lex animata ' ; therefore God Himself could be said to be the founder of the universal empire—' quia nec potestas nisi a Deo '.[1] Thus disobedience to the emperor's commands meant disobedience to a divine ordination and could be classed as an insult to God.[2] But these arguments could not perturb Oldradus. As to the ' divine ' origin of the empire Oldradus stoutly maintained that if this were true, at least one reference should be found in the Old and New Testaments, but he was unable to find even a trace of this idea in the Bible. ' Ego non invenio per legem novam neque veterem.' On the contrary, the idea of an empire was quite alien to the Old Testament, where kings only are mentioned, such as David, Saul, and so forth. One might adduce Christ's famous dictum ' Render unto Caesar . . .' but this utterance of the Lord did not, in Oldradus's opinion, amount to an approval of the idea of the empire : what Christ meant to convey with this utterance was that Christians should pay taxes to the emperor so as to avoid giving public scandal. Christ Himself had paid tribute [3] so as not to give offence.[4] And the assertion that disobedience to temporal commands constituted sinful behaviour, can be applied to every legitimate ruler, whether

[1] With a reference to Innocent III's dictum in *Liber Sextus*, v. 4. 1.

[2] Oldranus deduced this from the *Decretum*, xi. 3. 98.

[3] He refers to Matt. xvii. 24.

[4] He mentioned Matt. xviii. 7 and *Decretum*, xviii. 1. 8, in which canon St. Augustine said, though in a totally different context, that Christ paid tribute ' ne seandalizaret '. This was the usual canonistic interpretation of the preceding century.

emperor or king: 'Non loquitur tantum in imperatore, sed in alio quolibet principe veritatem jubente'.

It is, furthermore, true, Oldradus continued, that canon law expressly lays down the universal overlordship of the emperor,[1] but the passage in canon law does not say that the emperors held their empire on the grounds of justice: and Oldradus flatly denied that they had justice on their side when claiming to be universal overlords.[2] Secondly the Persians, Syrians and Greeks had their empires at their times, and yet nobody would consider them as 'domini mundi'.

Lastly, some support for the undivided sovereignty of the emperor might be found in Innocent III's utterance in which he referred to the king of France who did not recognize a superior. True, glossators had interpreted this dictum of Innocent III in a sense which meant that the emperor was *de jure* superior to the French king, but Oldradus would not bow before the authority of glossators. Their dicta may be reasonable, though not authoritative: 'Eorum dicta licet sunt rationabilia, non sunt authorizabilia'.[3] Moreover, Johannes Teutonicus was a German and therefore biased in the question. As to the position of the Spanish king, Oldradus mentioned that this monarch recognized the emperor so little 'de jure' that the mere citation of an imperial law in a Spanish court was threatened with death penalty.[4]

In his constructive part of the *Consilium* 69 Oldradus went little beyond the standpoint of Andreas de Isernia. The fundamental problem as seen by Oldradus concerned the legality of the emperor's position. Where and how did he acquire his alleged universal overlordship? Oldradus strongly emphasized the necessity for enquiring into the legal basis of the emperor's rulership. The argument of Andreas that the empire was founded by force and violence appeared with Oldradus in a far more generalized manner. All empires, he said, started by violence and usurpation, and that was precisely the reason why Christ had 'specialiter' reproved the Roman Empire, since He had destroyed all empires.[5] More than that: divine and natural law forbid, Oldradus averred with a reference to *Prov.* xxii. 28, that rulers should enlarge their dominions by violent means. The Decalogue, too, declared that 'thou shalt not covet any thing that is thy neighbour's'. Oldradus applied this injunction to the present problem saying that 'in quo (scil. praecepto) omnis rapina et violentia prohibetur'. Therefore, the right of

[1] *Decretum*, xii. l. 15.

[2] Canon law said: 'Romani principes, qui pene totius orbis monarchiam tenebant' Oldradus said: 'Hoc non negatur, quin tenuerint, sed negatur, quod juste tenuerint'

[3] In *Decretales*, iv. 17. 13.

[4] 'Scio, quod inter alias Hispani fecerunt unam (scil. legem), quod quicumque allegaret legem imperatoris in judiciis, capite puniatur.'

[5] 'Imo per Christum omnes monarchiae fuerunt destructae et etiam reprobatae.'

the emperor to transfer property [1] or to confiscate it for the sake of the public good, was devoid of any basis in divine or natural law. But if the followers of the idea of universal monarchy should assert that this and similar rights were contained in the law books, they were referred by Oldradus to the old legal maxim that nobody can be witness in his own affairs.[2]

From a purely legalistic point of view it may be asserted, Oldradus argued, that the emperor received his powers from the Roman people through the *Lex Regia*, whereby they had transferred to him all the powers previously vested in them. Although this was a very favourite argument amongst medieval jurists to justify the legality of the emperor's position,[3] Oldradus did not adhere to the current fashion. For if the Roman people should have validly transferred powers to the emperor, they must have had the power to do so, otherwise the transfer would be invalid. But Oldradus denied the Roman people the legal right to effectuate this transfer. They could not transfer more rights than they themselves had, since the Romans lacked all right to rule other peoples: 'Sed populus Romanus non habuit de jure dominium super alias nationes, ergo nec ipse'. It was a notorious fact that the Roman people had kept up their rulership 'injuste et violenter'. The rightful and lawful rulers of Rome were Romulus and Remus, because the 'civitas Romana' had been built by them: they and their successors were indeed kings, but they were expelled by the people in an illicit and revolutionary manner, and all further actions of the Romans, especially the enlargement of their dominions, must be classed as illegal. Their actions were based upon an illegal expulsion of rightful rulers. Therefore, the establishment of emperors after the republican period could not be supported by law or the idea of justice. The only consequence from the legal point of view was, Oldradus said, that the Romans had no power to transfer any lordship, let alone universal overlordship, to the emperor. Nor could it be said that the Romans might have acquired their powers by prescription, for they all were in bad faith which excluded prescriptive acquisition. Oldradus concluded: 'Imo omnes videntur esse successores vitiorum et culpae', and therefore no valid transfer of powers could have taken place.

However, canon law might lend some support to the claims of a universal overlordship of the emperor. The *Translatio Imperii* from the Greeks to the Germans was carried out by the

[1] Hitherto reckoned as one of his foremost privileges, see *Medieval Idea of Law*, pp. 100, 179, 181.

[2] 'Si hoc dicerunt, non crederetur, quia in facto proprio, in quo nullus idoneus testis invenitur'; reference is made to D. 22. 5. 10.

[3] See Gierke-Maitland, *Political Theories of the Middle Age*, Cambridge, 1938 (reprint), p. 43.

Church herself.[1] But the Church had, in the opinion of Oldradus, arrogated rights in this translation of the empire which she had not had before: 'Ecclesia plus juris sibi concesserit ex ista concessione quam antea habuerit'. This translation had not a constitutive effect, but was only declarative, that is to say, had only confirmatory character: but a confirmatory act could not bestow more rights than were possessed before: 'Per confirmationem non tribuitur jus'.[2]

From a positive point of view it might lastly be maintained that Roman law was a universal, civil law, but this argument is set aside by Oldradus whose definition, allegedly derived from D. 41. l. 1, had little in common with the definition of Gaius as given in that passage. For Oldradus civil law was all that law which was peculiar to a certain state: 'Jus civile dicitur jus proprium cuiuslibet civitatis'. In fact Oldradus had substituted 'cuiuslibet civitatis' for Gaius's 'civitatis nostrae'. Hence, he shaped a definition which was suitable to his own conceptions of a divided sovereignty. As an example he quoted the civil law of Spain and France, to demonstrate that each particular state had its own particular law which was the civil law of that state. This conception, if nothing else, justifies our assumption that Oldradus truly understood the nature of the sovereign state—and not only of the sovereign prince. With Oldradus de Ponte, the juristic counsellor of the papal curia, the ideological movement embodying the conception of sovereignty had found its conclusion.

Emperor in name, though in reality a cipher without the power his apparent position would have warranted, Henry VII failed to sense the temper of the time and its prevailing political ideas: by forcing the issue he antagonized the papacy without whose help he could hardly have hoped to realize his lofty aim; moreover, he drove the papacy into the hands of its fiercest adversaries, thus not ineffectively contributing to the eventful seven decades which left their mark on the history of the Church. But to Dante Henry VII remained the universal pilot[3] and a true Caesar.[4] The empire of the *Monarchia* is the vision of an idealist.

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[1] See Innocent III in *Decretales*, i. 6. 34. Innocent III must be credited with the invention of the *Translatio Imperii*, see the now famous, but then secret *Deliberatio Domini papae Innocentii super facto imperii de tribus electis*, in Migne, *Patr. Lat.*, vol. ccxvi, cap. xxix, col. 1025; cf. also the letter to the archbishop of Cologne, cap. xxx, col. 1032, the communication to the archbishop of Mainz, in Raynaldus, *Annales Ecclesiastici*, ad annum 1200, § 27, and the letter to the German princes of 3 May 1199, *Registrum de negotio Romani imperii*, Migne, *loc. cit.* cap. ii, col. 998.

[2] With a reference to *Decretales*, ii. 30. 1 and 2.

[3] *Convivio*, iv. 4: '. . . conviene essere uno quasi nocchiere . . .'.

[4] *Epist.*, vii. 1, written to Henry VII: 'Cumque tu, Caesaris et Augusti successor, Apennini juga transiliens, veneranda signa Tarpeja retulisti, protinus longa substiterunt suspiria, lacrimarumque diluvia desierunt'.